No. 1492. No. 10. (on docket)

Brief of Kirlin for Appellee

Filed Nov 16, 1896

SUPREME COURT OF THE UNITED STATES

AMERICAN SUGAR REFINING COMPANY
Libelant and Appellant

against

THE STEAMSHIP G. R. BOOTH
SAVILLE
Claimant and Appellee

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CONVERS & KIRLIN
Proctors for Appellee

J. PARKER KIRLIN
Of Counsel

Supreme Court of the United States.

OCTOBER TERM, 1896.

AMERICAN SUGAR REFINING COMPANY,
Libelant and Appellant,

AGAINST

The Steamship "G. R. BOOTH,"
SAVILLE,
Claimant and Appellee.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioner urged upon the Circuit Court of Appeals, as reasons for the reversal of the decree entered by the District Court, the same matters which it now brings forward as grounds upon which this Court should issue a writ of *certiorari*. The appellee therefore appends his brief, filed below, in which will be found a full discussion of the points mentioned in the petition, together with references to the evidence on the questions of fact which the petitioner now seeks to bring before this Court. These questions of fact have been found against the appellant by the unanimous decision of four judges, largely upon evidence produced by the appellant itself.

By way of further and more specific answer to the several numbered articles of the petition, attention is called to the following suggestions:

FIRST.—The libel was filed to recover damages to sugar, caused by the inflow of sea water through a hole in the ship's side, in a different compartment from that in which the sugar was stowed. The hole was made, as found by the Court of Appeals, by the accidental explosion of two cases of blasting caps.

SECOND.—The bill of lading contained the exceptive clause set forth in the second article of the petition. The District Court found that such exemption covered the loss.

THIRD.—The Judges of the Circuit Court of Appeals certified to this Court the question of law stated in the third paragraph of the petition.

FOURTH.—The certificate appears as No. 490 upon the docket of the present term.

FIFTH.—The proposition certified to this Court virtually involves the question whether the case of the *Xantho*, 12 App. Cas., 503, upon which the District Judge rested his decision, is to be followed in this country. It was evident to the Court of Appeals, as it will be to this Court, that the loss was within the exception, and the decree of the District Court was correct if that case is good law.

SIXTH.—The learned Court found that the cases of caps were carried by the shipowner without fault, as alleged in the petition; but it is not correct to say that the certificate assumes that the packages were explosive, or that they were received without heeding the labels on the cases. On the contrary, both the lower Courts found that blasting caps, when packed as these were, under the strict provisions of the German law, were not explosive within the ordinary meaning of that term, and where commercially treated and handled, and were entitled to be treated and handled as non-explosive cargo. The statement of facts in the certificate is very clear on this point.

SEVENTH.—It is not alleged that the Court of Appeals decided any question of law against the ap-

pellant; that Court has simply held against it on the facts. No case is made out, we submit, for a writ of *certiorari*, nothing being involved in the case as finally determined but matters of fact and the legal point now before the Court under the certificate.

EIGHTH.—The allegation that this case "involves the right of steamships to carry sensitive explosives, where the jar and beat of the engines is especially likely to cause fulminate of mercury to escape from the detonating caps," begs again the question whether caps packed in accordance with the German regulations are or ought to be treated as "sensitive" or any other kind of "explosives?" Both Courts below have found that the caps are not explosive by jar or friction, but only by communication of a spark.

The decision below is not in conflict with the *Nitro Glycerine Case*, 15 Wall., 524, 537, referred to in the petition. The passage quoted in the opinion in that case simply announces the principle that an injury to the cargo usually establishes a *prima facie* case which the carrier must overcome.

Libelant in the present case did not allege as for a breach of the steamer's obligation as a common carrier. On the contrary, the gravamen of the libel was that the explosion occurred through negligence specifically charged and alleged to be a violation of the contract contained in a bill of lading. Upon the proof of both parties, it was found that there was no negligence.

The passage quoted from the opinion of *Mather* v. *Ralston*, 156 U. S., 639, is not in point. That case deals with a material which was "in constant danger of explosion from heat or collision," while in the present case there was no heat in the vicinity of the articles which exploded, and the evidence was uncontradicted that blasting caps, packed as these were, were not commercially considered explosive or liable to explosion from collision, and were ordinarily stowed and handled as these were.

NINTH.—The cases of the *Delaware*, 161 U. S., 456, and the *Kate*, argued at the last term (January 6, 1896), are not authority for the petitioner's contention, since, in both those cases, questions of *law*, other than those certified, had been decided against one of the parties by the Court of Appeals, and the writs were there granted for the purpose of bringing before the Supreme Court all of the law points involved in the cases.

TENTH.—The tenth article of the petition again erroneously assumes that the Court below has dealt with the "liability of common carriers who take and stow dangerous and sensitive explosives as a part of general cargo," whereas the decision of both Courts below proceeded distinctly upon the ground that the case did not involve considerations as to the stowage of dangerous and sensitive explosives; but only of articles well known to commerce, which, although previously handled in immense quantities, had never before been known or thought to be explosive, and in fact had never exploded in handling or transportation.

The appellee respectfully asks the attention of the Court to the appended brief used in the Circuit Court of Appeals, in which the matters involved in the petition are fully discussed, and where the references will be found to the testimony in the record submitted with the petition.

The appellee respectfully prays that the petition may be denied.

Dated New York, November 13, 1896.

J. PARKER KIRLIN,
Of Counsel for Appellee.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

THE AMERICAN SUGAR REFINING COMPANY,
Libelant-Appellant,

AGAINST

The Steamship "G. R. BOOTH,"
SAVILLE,
Claimant-Appellee.

No. 91. October Term, 1895.

BRIEF FOR CLAIMANT-APPELLEE.

APPEAL BY THE LIBELANT FROM A FINAL DECREE OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DISMISSING THE LIBEL, WITH COSTS.

The Pleadings.

This libel was filed to recover damages to a consignment of 9,932 bags of sugar shipped upon the *G. R. Booth*, at Hamburg, in June, 1891, and alleged to have been delivered in New York about the 14th of July, 1891,

"in a greatly damaged condition, the contents of 3,000 of said bags being wholly or in great measure destroyed by *salt water*, and the value of the contents remaining in said bags greatly impaired, in all to the damage of the libelant in the sum of $10,000, or thereabouts" (*Libel*, fol. 9).

It was further alleged that whilst the vessel was discharging at the East Central Pier, Atlantic Dock, Brooklyn, an explosion occurred in the after hold, whereby "the steamer's plates burst open and started and *sea water was let in*, and the hold flooded, resulting in great loss to libelant's cargo, which was on board" (*Libel*, fol. 10).

The libelant did not declare generally, on a breach of the contract of carriage, but rests the cause of action on particular charges of negligence, as follows:

"The libelant, upon information and belief, charges that the said loss and damage to said sugar were due to negligence of the carrier and its agents, and fault of the officers and those in charge of said steamship, in that, among other cargo carried in the hold of the vessel, were a quantity of dangerous explosives; and the libelant charges as faults the carriage of the explosives, and particularly detonators and other blasting compounds, in the cargo hold of the said ship; in not taking due care in the loading and stowage of the same; in not placing the detonators in a safe place; in not taking proper precautions to guard against contact in stowing same promiscuously in the hold; in not cautioning the stevedores and longshoremen who were discharging the same; in the master and officers not acquainting themselves, or informing others of the dangerous properties of the cargo that was to be handled upon the unloading of said vessel; in allowing said explosives to be subjected to the ordinary handling of general cargo, and in not directing some officer or official that special care be taken in breaking bulk of a cargo wherein such dangerous compounds had been stowed, and in not observing the laws and regulations of the City of Brooklyn respecting the landing of such articles, and in other faults, which will be pointed out at the trial of this cause."

The answer of the claimant admitted that a part of the cargo was damaged by salt water when delivered (fol. 19); that the damage was the result of an explosion in the after hold, which burst open plates in the steamer's side and let sea water in, flooding the hold (fol. 20), but alleged that the damage was occasioned by perils for which, under the terms of the bill of lading, the steamship was not responsible under German law, in contemplation of

which the contract of carriage was agreed upon (fols. 23–26).

The answer further set up the following defenses:

I.—That "by the law and custom of the German Empire, it is not negligence or improper stowage to stow packages containing detonators properly packed for shipment, as these carried on this voyage were, in the same hold with general cargo, when the packages containing detonators and the other cargo, as was the case here, are properly stowed with reference to each other" (fols. 20–21).

II.—That by the bills of lading, it was agreed that "the ship and carrier shall not be liable for the loss or damage occasioned by the perils of the seas or other waters * * * by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances, by collision, stranding or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner * * *;" and that each of the quoted exemptions was valid by German law (fols. 22–23, 25–26).

III.—It was further alleged that those in charge of the steamer were not aware that any explosives were in the hold, or that detonators were explosives, and there was no admission that it was detonators that exploded (fols. 27–28).

Statement of the Facts.

The claimant deems the following facts to be established by the proofs:

1. On the 14th of July, 1891 (fol. 39), at about 10.30 A. M. (fol. 42), that being the third day of the discharge (fol. 53), whilst the vessel was unloading at the East Central Pier, Atlantic Dock, Brooklyn, a heavy explosion occurred in the No. 4 hold (fol. 39) on the starboard side of the shaft tunnel (fols. 42, 43, 400), about three feet from the after bulkhead (fol. 49), in the ground or floor tier of cargo (fols. 400, 401, 487). But for the explosion the discharge of cargo would have been finished that night (fol. 58).

The explosive, whatever it was, gave a single, quick, heavy report which shook the steamer fore and aft (fols. 55, 66, 82, 103–4, 134, 160, 182), and emitted a light col-

ored smoke, which kept coming from the hold for several minutes (fols. 41, 67, 85, 105, 130, 184, 246). The report was likened by the witnesses to the discharge of a heavy cannon. Afterwards there was a smell in the hold somewhat like powder (fol. 126). It was not followed by any fire (fols. 148, 123, 259).

The explosion blew a hole into the iron shaft tunnel, on a level with and below the shaft, large enough for a man to pass through, part of the iron being wholly blown off; five of the steamer's plates were badly dented and bent out so as to make a hole in the side of the ship about three or four feet from the after bulkhead on the starboard side of the No. 4 hold, three of the plates requiring to be taken out and rolled; sixty rivets were blown out; five of the ship's frames and one reverse bar were damaged; six deck beams, probably from twenty to twenty-five feet above the place of explosion, were broken, and the deck was blown about six inches out of level; the fresh water tank on deck was blown loose, the iron strap fastenings being broken and blown away, and a part of the wharf shed alongside the ship was blown to pieces (fols. 72, 73, 74, 48, 49, 50–52, 141, 175–6, 222, 223–226, 249, 252, 497).

Two men were killed, one being blown to pieces, and two on deck were injured (fols. 100, 89, 95, 83, 135, 136).

In consequence of the opening of the ship's side, sea water to a depth of about 12 feet entered the after (No. 4) hold, and, passing through the wooden partition between that and the No. 3 hold (fol. 242), damaged part of libelant's cargo which was stowed in No. 3 (fols. 146, 188).

A tarpaulin was put over the damaged plates on the outside of the ship and the water pumped down to the ceiling about 6 o'clock on the night of the explosion (fols. 189, 25–7, 164, 68, 434).

The water was all pumped out and the remainder of the cargo discharged on the following day (fols. 88, 89).

2. All of the officers and engineers and those of the crew who had anything to do with the cargo were examined, and were ignorant that there was any explosives in the ship, except nine cases of acids, which were pointed

out to the mate by the stevedores in Hamburg as explosive, and were stowed on deck (fols. 62, 117, 147, 172, 210, 229, 554–5, 557, 568, 571).

3. It is not known what exploded. The fifth article of the libel charges as faults "the carriage of the explosives, and particularly detonators and other blasting compounds in the cargo hold of the said ship" (fol. 11). Neither the proofs nor the manifest disclosed the presence of any blasting compounds in the holds (fol. 718), so that the specification of fault must be limited to the carriage of detonators in the cargo hold.

4. Two boxes of detonators (blasting caps or exploders, 264, 265) were short delivered (fol. 238). Libelant desires the Court to infer from this shortage that it was detonators that exploded.

The inference, so far as it rests on the fact of shortage, does not arise, for there were various other packages of cargo short delivered (fols. 515, 516).

A box of detonators contains 25,000 copper caps nearly an inch long. They are packed 100 in a tin box, 5 tin boxs in a blue pasteboard box, 50 of these in a wooden box, the wooden box in a big tin case sealed; the tin case in a wooden box; this wooden box with three inches of sawdust all about it encased in a heavy box about 2½ feet square (fol. 387; also p. 68). Although the hold and debris were most carefully examined and searched, not the slightest piece or sign or a cap or of any of the numerous metal cases was found.

Although there were 50,000 caps in the two missing cases, the explosion gave but one single heavy report like the discharge of a cannon.

It was not proved that a box of detonators in exploding would make that kind of a report. One of libelant's witnesses states that the explosion of 25,000 detonators "*makes quite a racket* (*fol.* 315);" that is the only evidence there is on the subject.

It is supposed by the claimant that the explosion was due to the accidental and fortuitous discharge of some powerful explosive which had been secretly shipped, fo

undiscovered reasons, in a box with harmonicas (*fols.* 401, 402, 433, 496, 415, 486–492).

5. There were no detonators in the No. 4 hold at the time of the explosion.

Detonators are packed in dressed wood boxes screwed together, making neat and trim packages easily recognizable and uniform in size (*fols.* 184, 402, 404, 409). The stevedores' foreman, who was in the hold about three minutes before the explosion (*fols.* 396-7), and his superintendent, who had been in the hold a little time before (*fol.* 487) for the purpose of ascertaining the number and character of the packages remaining in that compartment, with a view to ascertaining whether there remained enough room to stow them on the pier opposite the hatchway (*fols.* 459, 487, 488), state that there were no detonators in the hold at the time of the explosion, the remaining packages being all large boxes of harmonicas and books (fols. 402, 408, 409, 452, 453, 460-461, 487–492).

The only sling load that was made up after Frazer left the hold came up just as the explosion occurred (fol. 397).

It was the opinion of the stevedores that a large box, supposed to contain harmonicas, really contained the explosive. Regan, who was blown to pieces, was handling one of the boxes of harmonicas when Frazer left the hold, a moment before the explosion. When he came back, no sling having meantime left the hold, Regan and the box were both blown to pieces (fols. 398, 399, 415, 416). Whatever it may have been, it was on the ground tier, on the floor, and the only jar which could have affected it must have resulted from merely turning the box over (fol. 401).

6. Detonators, when packed as usual in trade, and as these were, are not considered commercially to be dangerous or explosive, either in this country or in Germany, but are regarded, treated and shipped in all respects as ordinary merchandise (Townsend, fols. 471, 472, 473, 474; Frazer, 406, 407, 423; Wisner, 359, 364, 366; Spence, 371, 372;

Chapman, libts'. expert, 331, 340, 341. Refer also to Major Majendie's Report, dated Aug. 10, 1887, p. 7, and App. C., pp. 16-16).

Libelant's expert Lau, who has imported these detonators for seventeen years (fol. 264), by sail and steam vessels (fol. 273), describes the method in which they are by German law required to be packed (pp. 68, 69), which substantially corresponds with the evidence as to the way the detonators on the *Booth* were packed (pp. 96, 97). With regard to their safety, when so packed, he says:

"Q. *When they are packed in the way you have described, they are not commonly supposed to be dangerous to handle, are they?* A. *No, sir.*

Q. *Or to ship?* A. *No, sir*

Q. *How could you account for the package, packed as you have described, exploding without being opened?* A. *I could not account for it at all—it is a mystery.* I could only say that possibly they were poorly packed, or they may have been careless in the manufacture of them, because I know that experiments have been made on them, where *a full case of those caps have been thrown out of a window several stories high, so that the iron cases went all to pieces, and they did not explode.*

Q. *They won't explode by contact on the outside, will they?* A. *No, it is an impossibility.*

Q. *A blow won't make them?* A. *No, sir.*

Q. Suppose you were to strike them with an iron or steel hammer, so as to make a spark? A. Then, if that spark touched the fulminate it will explode. It is the spark that does it.

Q. The mere force of the blow, without the spark, wouldn't do it? A. No; these are packed and all *filled with sawdust—the caps*—the outside of them are filled with sawdust, so as to prevent the possibility of any of the particles of fulminate to get loose, and then there is a piece of felt or pasteboard on top (fols. 301, 302, 303).

Q. As long as they remain in the package, ordinary bumping or handling of the package is not commonly considered dangerous? A. No, sir. We have shipped millions upon millions all over the world, from here and from the other side, and we have never heard of a case. That is the first case I ever heard of.

Q. *You have been in Germany where these things are imported and shipped?* A. *Yes, sir.*

Q. *Are they not shipped in Germany as articles of ordi-*

nary commerce? A. Yes, sir; they are marked just what they are.

Q. But they are shipped and handled as ordinary merchandise? A. Yes, sir; just the same. I do not know any difference" (fols. 307, 308).

Explosives made in this country by Chapman are apparently more sensitive to shock, as they may be exploded by a jar (fols. 317, 322, 331). Their sensitiveness depends on the amount of chlorate of potash mixed with the fulminate in the manufacture (fols. 318, 319, 320). But even the American caps are not marked "explosives" on the boxes when shipped.

Those made in Germany, it appears from the evidence of libelant's witness Lau, who has handled them for 17 years (fol. 264), and has known them in Germany as well as here (fol. 308), are so manufactured that they will not explode from shock or jar (fols. 302, 303), but only from a spark (fol. 304, 306).

This difference in manufacture is confirmed by the fact that they have long come to this country as ordinary merchandize with no English mark denoting an explosive character (fols. 202, 554), and without the German mark "Mit Vorsicht," which is put on dangerous packages (fols. 424, 425); and further by the fact that while the German law requires them to be packed in a prescribed way (fol. 273), it apparently does not require them to be marked as dangerous. The usual notice given to a master when explosives are shipped was not given by the shippers or charterers (fol. 229).

The appellant contends that the marks "Capsules" and "Sprengkapseln" gave notice of their explosive character. These were on a small white label on one corner of the boxes in Roman letters about a quarter of an inch long, one word under the other, "Capsules" being the top word (fol. 383, 384).

Mr. Chapman, a witness for libelant, who is one of the largest manufacturers of this article in this country, admitted he would not have recognized exploders or blasting caps under either of the marks on the boxes (fol. 343). It seems a good deal to require simple seafaring people to take notice of the identity and alleged explosive character

of the caps from the words "Capsules" or "Sprengkapseln," when experts in the trade would fail to do so.

"Capsules" clearly would not give any notice except, possibly, to experts. Chapman says from that mark he would expect to find little packages for medicine (fol. 343).

Appellant's counsel lays great stress on the word "Sprengkapseln," and calls attention to various compounds of the German word *sprengen*, which means "to cause to break." Some of its compounds are used to describe things which are themselves explosive (Appellant's Brief, p. 12). Other compounds describe things not in themselves explosive, but which are used to explode other things (fols. 257, 265). Sprengkapseln belongs to the latter class (fol. 265). It means exploding caps or exploders, not *explosive* caps; caps to detonate a heavy explosive, not caps which themselves explode. Libelants own evidence shows clearly that the caps are, in fact, what the mark indicates—exploders, and no one not an expert would from that mark consider them otherwise than as belonging to the class of gun caps or percussion caps which are not classed as explosives (fol. 512).

Libelants have not a word in the record (leaving out of view for the moment the learning in the brief, p. 12) to show that "Sprengkapseln" would indicate, even to a German, that the contents of a box so marked was either explosive or dangerous.

The less sensitive nature of the German caps is further shown by certain incidents connected with the discharge, and experiments to determine whether they were explosive from shock or jar.

Captain Saville was unable to explode a detonator by dropping or striking it (fols. 212–314). A box of detonators on the dock, was dropped seven feet by Frazer with no harmful result (fols. 410–413).

Truckmen tossed the cases from where they were piled to the trucks, dropping them at least two feet, necessarily giving the cases severer jars and shocks than they would receive in being handled by stevedores. On being cautioned after the explosion to handle them more carefully, a truckman said, "There is no fear," and that he

had handled them time and again (fols. 493, 394). Lau says they have been thrown out of a window several stories high, so that the cases were broken to pieces without any explosion happening (fols. 301-303).

7. For many years before this explosion detonators were commonly shipped from Hamburg to New York as ordinary merchandise, and stowed with general cargo under deck in steamers and sail vessels, and in a less degree have been so shipped since (Spence, fols. 371, 372, 380, 381; Frazer, 404, 407, 421, 422, 423; Townsend, 471 to 475, 476, 477 to 482, 508 to 511; Wisner, 359, 364). Since the rumor went abroad that detonators exploded in the *Booth*, some steamers now take them in the square of the hatch, or on deck, but there is nothing to show that was ever done before this accident.

Although Townsend and Frazer, who have discharged hundreds and hundreds of ships in New York, could not recall many names of steamers which had brought detonators from Hamburg under deck, as general cargo, yet appellant's counsel is in error in saying they could not specify the name of one such steamer. They specified the names of the following steamers: *Imperial Prince* or *Lauthorne Abbey* (fol. 475), *Abendana* (fol. 477), *Arroya* (fol. 478), besides the *Booth*, from memory; and Townsend says that for five years (467) he was compelled to discharge two or three steamers a month from Hamburg (fol. 480) and about one in every five had detonators stowed in the lower holds as general cargo, and that he had never seen them stowed in the square of the hatch and only once on deck (fol. 481). Wisner, an importer of detonators (fols. 359, 364), and Spence, agent for a Hamburg line (fols. 371, 372, 380, 381), both say that it has been customary for detonators to come from Hamburg as general cargo under deck.

Appellant's criticism that the *claimant* called no witness from Hamburg ignores the fact that the burden of showing bad stowage was on the libelant, who called no such witness.

A presumption of fact that the goods were stowed in the usual way would arise from stowage by German

stevedores in a German port (fols. 203–5, 154, 159, 553, 563).

Some effort was made to show that they ought to be stowed in the square of the hatch, or on deck, in steamers, but the witnesses were unqualified, and without experience (*Ancher*, 522, 527–531, *and Witte*, 535, 538, 540).

In sailing vessels they come under deck just the same as any other cargoes in quantities as large as 500,000 and 2,000,000 (fol. 284); as many as 500 cases in one cargo (fol. 423).

Appellant's counsel suggests that while it may be safe to ship them in sail vessels under deck as general cargo, it would not be so in steamers because the vibration might detach some of the fulminate and thus induce an explosion. It is significant that *no witness* makes any such suggestion; and an examination of one of the small boxes showing the empty part of each cap filled up with saw dust, and covered at the mouth with a close fittlng piece of felt (fol. 303), will show that it is entirely without foundation. Speculation helps little in a technical matter of this kind.

8. The stevedores who discharged the cargo were supplied with a cargo list and knew that there were detonators on board (fols. 405, 406, 469). They did not caution the longshoremen to handle the packages with care, because it was not known that they were dangerous (fols. 473, 513).

It is incorrect to say (Appellant's Brief, p. 4), that "after the case had been argued (p. 98) *claimant* obtained leave to put in additional evidence." According to the record "*both parties* obtained leave to take further proofs." Both did so.

The District Court dismissed the libel with costs, and the case now comes before this Court on libelant's appeal.

POINTS.

I.

The loss was by a "peril of the seas or other waters * * * or other accidents of navigation of whatsoever kind" within the exception contained in the bill of lading (fols. 679–681).

The loss for which libelant filed this libel resulted from the contact of sugar with salt water. This is set forth twice in the libel. It is alleged that claimant "delivered the said shipment to the libelant in a greatly damaged condition, the contents of 3,000 of said bags being wholly or in great measure destroyed *by salt water*," &c. (fol. 9), and that "an explosion occurred in the after hold, whereby great damage was done * * * the steamer's plates burst open and started, and *sea water let in*, and the hold *flooded, resulting in great loss to libelant's cargo*," &c. (fol. 10).

These are the only particulars of damage set forth in the libel.

It is thus distinctly alleged that the proximate cause of the loss was the incursion of sea water through a hole in the ship's side. Irrespective of the allegation, such was plainly the fact. The sugar was not damaged by the explosion.

The damage having admittedly occurred in this way, the first question which arises is: Was the loss within any of the exceptions contained in the bill of lading?

The claimant's contention is that such damage caused by the entrance of sea water through a hole in the ship is a loss "occasioned by the perils of the sea or other waters * * * or other accidents of navigation of whatsoever kind" within the meaning of the exceptions (fols. 679–681).

It is a matter for separate consideration whether any negligence ascribable to the claimant may deprive him of the benefit of the exemption; but that will not affect the proposition that the loss was by "a peril of the seas

or other waters, or other accidents of navigation." If negligence be found, it will simply disentitle the claimant to the benefit of the exemption, unless the negligence clauses (fol. 680) are valid under German law.

The argument of the appellant appears to confuse these distinct and separate propositions. He claims that if negligence contributed in any way to the accident, the nature and character of the loss, *as a loss*, is thereby changed. In other words, that the sea flowing in on the the sugar is a sea peril loss if the ship was free from contributing fault, but that it is not such a loss if the accident was contributed to by negligence.

The conclusion from that line of argument is that the meaning of the words in the exception is changed when the element of negligence enters into the loss. This result is strained and illogical. It also involves the contention that the words "loss occasioned by perils of the sea or other waters" have a different sense and meaning when found in a bill of lading from that ascribed to them when written in a policy of insurance.

It is clear that the loss here in suit would be a sea peril loss within the meaning of a policy. It was admitted on the argument below that this is an underwriter's case. If libelant's construction be correct, therefore, the underwriter by this suit is saying, in effect, "I have paid for a loss by perils of the sea, and claim on you (carrier) because the loss was not by perils of the sea."

The later English cases hold that there is no difference in the meaning of the words "perils of the sea and accidents of navigation," whether found in a policy or in a bill of lading, and that a loss which would be deemed a loss by a peril of the sea or danger of navigation, within the meaning of a policy, is such a loss within the meaning of the same words, when found in a bill of lading. The only difference between cases of insurance and carriage, is that a carrier may be disentitled to the benefit of the exemption, if the libelant shows that negligence by the carrier contributed to the loss.

This distinction was pointed out in *Liverpool Steamship Co.* v. *Phœnix Ins. Co.*, 129 U. S. (at p. 438), where Mr. Justice GRAY said:

"The policy of insurance against perils of the seas cover a loss by negligence of the master or crew, because the insurer assumes to indemnify the insured against losses from *particular perils*, and the insured does not warrant that his servants shall use due care to avoid them; but the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods, and, as is everywhere held, an exemption in the bill of lading *of perils of the seas or other specified perils* does not excuse him from that obligation or exempt him from liability *for loss or damage from one of those perils* to which the negligence of himself or his servants has contributed (*The Xantho*, 12 App. Cas., 503)."

In The *Xantho*, thus cited with the approval of the Supreme Court, the House of Lords dealt with the exact point here involved, and decided it adversely to the appellant's contentions.

The question there at issue was whether the owners of the *Xantho's* cargo could recover against the owners of that vessel, their damages sustained through the vessel being sunk in a collision. The bill of lading contained an exception of "*dangers and accidents of the sea.*"

The course of the case to and in the House of Lords was peculiar. The plaintiffs proved shipment and loss of their cargo by the collision, but adduced no evidence of fault by the *Xantho*. The defendant proved the exceptions to his liability contained in his contract and rested. He did not adduce any evidence to show he was free from fault for the collision, or that the other vessel was exclusively in fault, because *Woodly* v. *Michell*, 11 Q. B. D., 47, had held that damage to cargo caused by a collision due to another vessel's fault was not a loss by peril of the sea and that case was binding on the Admiralty Court. On that state of the proofs, the Probate Division held the loss was not by a danger and accident of the sea and this decision was affirmed in the Court of Appeal.

It thus appears that the question before the House of Lords was two-fold (1), whether *Woodly* v. *Michell* was rightly decided; and (2), if not, whether the Court could say whether the loss was a sea peril loss, *without know-*

ing which ship was at fault for the collision. As the record stood it did not present the further question whether the owners of the Xantho were relieved from liability by the exception, and therefore the House of Lords refrained from expressing any opinion on that point. That is what is meant in the passages quoted from the opinions of the law lords at page 8 of the appellant's brief, under an apparent misapprehension as to what the case really decides.

The Court overruled *Woodley* v. *Michell*, and held that as the damage occurred from the incursion of sea water through a hole made in the ship's side by collision, it resulted from a danger and accident of the sea within the exception; but left open the question whether the shipowners were entitled or disentitled to the benefit of it.

Lord HERSHELL (at p. 508), said:

"The question, what comes within the term *perils of the sea* (and certainly the words *dangers and accidents of the sea* cannot have a narrower interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

"I think it clear that the term *perils of the sea* does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that, if a vessel strikes a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into

collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler*, 5 *M. & S.*, 461, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

"But it is said that the words, *perils of the sea*, occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, whilst, in the former, you may go behind the *causa proxima* and look at what was the real or efficient cause. * * * Now, I quite agree that in the case of a marine policy, the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. *But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception.* It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occuring in two maritime instruments."

Lord BRAMWELL (at p. 513), said:

"Was it by a peril of the sea that the defendants' ship foundered? *The facts are, that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea.* If the hole had been small, there being a piece of bad wood, a plank

starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. *Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other?* The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say, 'I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea.' The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, 'Oh, the loss is not by perils of the seas, but by bad carpentering.' Let there be no doubt. I do not say that in such case, the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas."

As this case was cited with distinct approval to the only point that it decides, in *Liverpool Co.* v. *Phenix Ins. Co.*, 129 U. S., at p. 438, it may fairly be taken for good law here as well as in England.

In *Hamilton* v. *Pandorf*, 12 App. Cas., 518, a similar question arose, viz., whether the damage to rice by sea water, which entered the ship through a hole gnawed in a

pipe by rats, was a danger or accident of the sea, within an exception in the bill of lading. The Court held *it was*, and on a finding of the absence of negligence absolved the shipowners from liability.

Lord HALSBURY, *L. C.* (at pp. 522, 523, 524), said:

"My Lords, in this case the admissions made at the trial reduce the question to this: Whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner *is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts as I have stated them constituted a danger or accident of the sea.* * * * Some effect must be given to the words *perils of the sea.* A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni* v. *Drury*, 8 Ex., 166; 22 L. J. (Ex.), 2. In the Law Journal report of that case Pollock, *C. B.*, and Alderson, *B.*, distinctly pointed out, after the judgment of the Court had been given, that the decision at which the Court had arrived did not touch the question of whether the sea let in by a hole made by a rat was an accident or danger of the sea. *One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel (from the sea) upon which the vessel was to sail in accomplishing her voyage.* It would not necessarily be by a storm; the parties have not so limited the language of the contract. It might be by striking on a rock, or by excessive heat so as to open some of the upper timbers. These and many more contingencies that might be suggested would let the sea in, but *what the parties, I think, contemplated was that any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract.*

"A subtle analysis of all the events which led up to, and in that sense *caused* a thing, may doubtless remove the first link in the claim so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravi-

tation which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

"In the class of contract *where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them*, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words *dangers and accidents* of the seas * * *

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case *it was a danger, accident or peril, in the contemplation of both parties, that the sea might get in and spoil the rice.* I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword fish from without—the sea water did get in."

Lord WATSON (at p. 525) said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of the mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risks; that in a case of a charter-party or bill of lading, the Court ought to look to what has been termed the remote, as distinguished from the proximate cause of damage; whereas, in the case of a policy the proximate cause can alone be regarded. *The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of the contract, to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner, or of those for whom he is responsible.* * * * I am of opinion that the appellants must prevail, *because it has not been shown that the peril, which was the immediate and efficient cause of damage, owed its existence to their negligence.*"

In *Davidson* v. *Bernand*, L. R., 4 C. P., 117, a steamer's draft was increased at the port of loading by taking on cargo until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve, and some cocks or valves in the machinery having been negligently left open, flowed into the hold, causing damage to cargo. *Held*, in an action on a policy covering the goods, that the loss was within an insurance against "perils of the seas and all other perils, &c."

In *Carruthers* v. *Sydebotham*, 4 Maule & Selwyn, 77, goods were damaged on board a vessel in port, which took the ground at low tide and fell over on its side, and was bilged, in consequence of which the vessel filled with water. In an action on the goods policy, *held* that the loss was within an insurance against perils of the sea.

Lord ELLENBOROUGH, *C. J.*, (at p. 84), said:

"In this case, the ship has lain on the strand, and the commodity has had sea water on it and has been damaged, which is one of the perils insured against; and all this has happened in the course of the voyage."

BAYLEY, *J.* (at p. 87), said:

"It is unnecessary for me to enter much into detail. With respect to this being a damage occasioned by a sea peril, it is clear that it was the sea water which occasioned it. Therefore, upon that part of the case there can be no doubt."

In *Lowry* v. *Douglass*, 15 M. & W., 745, the action was to recover damages to cargo carried under a bill of lading, excepting "*All and every the dangers and accidents of the seas and navigation*"

The ship was taken into the Commercial Dock at London to discharge her cargo, and for this purpose was fastened by tackle on one side to a loaded lighter lying outside her, and on the other a barge lying between her and the wharf. The crew were discharged, except the mate, and lumpers were engaged in discharging her when the tackle broke, whereby she was fastened to the lighter, and, in consequence she canted over, water coming in through her ports, and the goods still on board were damaged. *Held*, that this was a loss within the exception in the bill of lading; and the plaintiffs having failed to satisfy the jury that the accident was contributed to by any negligence on the part of the shipowner, the Court held the shipowner was not liable.

In *Clark* v. *Barnwell*, 12 How., 272, it has been held that damage to a consignment of thread, by dampness, which penetrated the boxes whilst the vessel was in a warm climate (heat of hold and sweat), was within an exception of "dangers and accidents of the seas," and the Court held that if the plaintiff claimed that the loss was contributed to by any negligence on the part of the shipowner, he must allege and prove the negligence in order to prevent the operation of the exception.

In *Transportation Co.* v. *Downer*, 11 Wall., 129, it was held that water damage to coffee, caused by vessel stranding on attempting to enter a lake port, was a loss within an exception "dangers of lake navigation," and that the defendants were entitled to an instruction to the jury that the burden of proof was upon the plaintiff to defeat the operation of the exception by the express allegation and proof of contributing negligence.

In the *Norway*, Br. and Lush., 404, damage to cargo, caused by stranding of a vessel leaving harbor, was held by the Privy Council to be within an exception of "perils of the seas," and that the operation of the exception could be defeated only by affirmative proof that the stranding was caused by negligence.

In the *Southgate*, 1893 Prob., 329, the entrance of water through an overboard delivery valve, connected with the circulating pump, which the engineer properly opened, but had neglected to close, during the loading of cargo, was held to be a loss by "a danger and accidents of the seas or other waters," as well as "an accident of navigation," within the meaning of an exception in a bill of lading.

In the *Cressington*, 1891 Prob., 152, the exception in the bill of lading was: "Perils of the sea * * * and other accidents of navigation, even when occasioned by the negligence * * * of the * * * master." During the voyage, in consequence of heavy weather, a rivet in the foot of a bulwark stanchion worked loose, and through the leak thereby occasioned the cargo was damaged by sea water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea water. Owing to the dunnage of the waterways in the 'tween-decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the lower hold was still further damaged by sea water. In an action for damage to cargo, brought by the plaintiff, who had purchased the cargo in transit, against the shipowner, *held* that the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuation of the leakage not being prevented; for, the inflow of the water being a *peril of the sea and an accident of navigation*, the negligence of the master in respect to it was covered by the exception in the bill of lading.

Sir JAMES HANNEN, President (at p. 160), said:

"The first question is, whether the *prima facie* liability of the shipowner for the damage which arose to the

cargo is removed by the exception contained in the clause. The learned Judge in the Court below appears to have thought that the original source of damage was not attributed to the shipowner, but that he was liable to this extent, that, when the damage was discovered to have arisen, the master did not make use of such means as were in his power to prevent the continuance of the leakage, and that that was not within the exception. We are of opinion that that is not so. *The mischief arose from the inflow of water in the course of navigation, and that, in our judgment, is a peril of the sea and an accident of navigation.* The clause, however, goes on to say, 'perils of the sea and accidents of navigation, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners.' It appears to us from these words in the clause that the alleged negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against."

In the *Eve*, 14 U. S. App., 626, damage to cargo from water, which entered the hold through the top of the ballast tank, where a stanchion had been broken off by stress of weather on the voyage, was deemed a loss by a peril of the sea.

In The *Castleventry*, reported in 69 Fed., 475 (note), the Hanseatic Court of Hamburg held that cargo damage caused by filling the water ballast tanks to overflowing at the port of destination of navigation was a loss caused by an accident of navigation. The Court said:

"The second point in dispute between the parties in this suit concerns the question whether, in the case now before the Court, there is any reason to speak of 'an accident of navigation.' This question must be answered in the affirmative. The County Court is right to suppose whilst referring to said verdict of the Imperial Supreme Court (Vol. II., No. 21) that the *accidents of sea and navigation not only include those accidents occurring in the port of shipment, but also those occurring in the port of destination, up to the time of final discharge of cargo. Any accident occurring in handling the tank, especially whilst filling same, has to be treated as an accident due to and caused by navigation, and, therefore, has to be considered to fall under the perils of navigation.* This opinion has been expressed by this Court, in a verdict given,

8/2, 1892, * * * which happened in a port of shipment, and had been confirmed by the Supreme Court. It can, therefore, not be seen why the same points of view which are held conclusive for filling a tank in the port of shipment, shall not be held good for the same manipulation, if performed during the discharge of cargo in the port of destination; that means, at the time during which the vessel still served as means of transport, and therefore, the voyage had not been terminated, so far as the cargo is concerned. Consequently, in itself, 'an accident of navigation' must be considered to exist in this case."

In the *Glendarroch*, 1894 Prob., 226 (C. A.), the plaintiffs brought an action against the owners of the *Glendarroch* for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water, through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea.

The President (Sir F. H. JEUNE) ruled that in order to excuse themselves from the damage to the goods, it lay on the defendants to show not only a peril of the sea, but *a peril of the sea not occasioned by their negligence.*

Held by the Court of Appeal (Lord ESHER, *M. R.*, LOPES and DAVEY, *L.JJ.*) reversing the decision below, that as the loss apparently fell within the exception, the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs.

Damage to cargo from water entering the ship's side through a leak is within an exception of perils of the sea.

The *Bluejacket*, 10 Benedict, 248.

Other cases in which water damage to cargo caused by injuries to a vessel's bottom from stranding, have been held to be dangers of navigation, are:

Williams v. *Grant*, 1 Conn., 87.
Pennewill v. *Cullen*, Harrington, 238.
Hibernia Ins. Co. v. *St. Louis Transportation Co.*, 120 U. S., 166.
Bowring v. *Thebaud*, 42 Fed., 794, 796.
Garrigues v. *Coxe*, 1 Binney (Pa.), 592.

This review of cases seemingly warrants the conclusion that appellant's first point, that this loss was not a loss by a peril of the sea, is not well taken.

The law of the United States, as well as the English law, treats contact of goods with sea water as *prima facie* a sea peril, and contact of goods with river water as *prima facie* a danger of river or lake navigation.

The appellant further argues that "the incursion of the water is not a *cause*" (Brief, p. 8).

It was the incursion of sea water which damaged the cargo; it was not only "a *cause*," but *the* cause.

The brief further says:

"It (the incursion of the water) is itself the result of the bursting of the bilge plates, and the real cause of the damage is the explosion" (p. 8).

Nevertheless, the explosion and the bursting of the plates did no damage until the sea water came in. The explosion was the remote, not the approximate, cause.

The explosion itself contributed to the result only in the same way that the manufacture of the explosive did, that is, it was a *causa sine qua non*, but not a *causa causans*.

The cases of the *Portsmouth*, 9 Wall., 682, 685, and the *Edwin I. Morrison*, 153 U. S., 199, 210, do not support the appellant's position.

In the case of the *Portsmouth*, the bill of lading contained an exception of "dangers of navigation." Those in charge of the vessel, mistaking shore lights for harbor lights, had deliberately run the vessel aground, without taking any precautions to ascertain their true position, but supposing they were entering the mouth of a harbor. To release her from her stranded position a portion of her cargo was jettisoned, and upon the evidence the Court found that even the jettison was unnecessary. No cargo on board the ship had been damaged. The question was whether a jettison, under those circumstances, should be considered "a danger of lake navigation." The Court held it was not.

The same ruling would probably have been made in an action upon a policy, which did not specifically cover "jettison."

The case of the *Portsmouth* should be read with *Transportation Co.* v. *Downer*, 11 Wall., 129.

In the *Edwin I. Morrison*, 153 U. S., 199, 210, the point alluded to was evidently a statement by the Chief Justice that the loss there in suit could not be considered a peril of the sea, because the Court found that the ship was unseaworthy when she sailed, and, therefore, the exceptions in the bills of lading could not apply.

It would follow, from the decision in the *Morrison* case, that the libelant there could not have recovered under an action upon a policy insuring him against peril of the sea, because the goods were not shipped on a seaworthy ship.

The fallacy underlying the appellant's contention, with regard to the force of the exception, lies in this: That he, in effect, asks the Court to interpret the exception as though it read "perils of the sea or other accidents of navigation *to which the negligence of the carrier has not contributed.*"

The violence this contention would do to the language of the exception, appears, when it is remembered that the exception reads: "Perils of the sea or other waters * * * or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or the servants of the shipowner."

The Court is asked not only to read *out* the qualification that the parties have themselves put on the clause, but to read *in* one that they have left out.

We cannot better deal with this branch of the case than by quoting the language of Lord ESHER, upon the same point, in the *Glendarroch*, 1894 Prob., 226 (at p. 231):

"When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say 'perils of the sea not caused by the negligence of the captain or crew.' You have got to read those words in by a necessary inference. How can you read them in? They can only be read in, in my opinion, as an exception upon the exceptions. You must read in, 'Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the servants of the owner.'

"That being so, I think that according to the ordinary course of practice, each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is, 'Yes; but the case was brought within the exception—*within its ordinary meaning*.' That lies upon them. *Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception.*"

In this case the Master of the Rolls points out that such a contention ignores the ordinary course of pleading and the shifting of the burden of proof from one side to the other, which obtained in actions at law. The plaintiff in such case generally alleged his contract, the shipment of the goods in sound order, and delivery. The defendant then set up that the loss was within one of the exceptions contained in his contract, setting it forth in terms. It was no part of the defendant's plea that he had not contributed to the damage by any neglect on the part of his servants, and no case is to be found, Lord Esher points out, in which a demurrer has been sustained to a plea setting up exceptions, because the plea did not allege that the loss occurred without any contributing fault on the part of the defendant. On the contrary, the ordinary rule was for the plaintiff in reply to assign the contributing negligence which he claimed would entitle him to recover, notwithstanding the exception.

This was the exact case in *Wyld* v. *Pickford*, 8 M. & W., 442, where the defendants by their plea alleged that the loss was one for which they gave notice on receipt of the goods that they would not be responsible. On a special demurrer to this plea, it was held that the plea need not further allege that the loss occurred without the defendant's negligence.

PARKE, *B.* (at p. 459), said:

"The third objection was that the plea ought to have gone on to allege that the loss was not occasioned by such negligence as the defendants were responsible for, not-

withstanding the terms on which they accepted the goods. We think that the proper answer to this objection was given, viz.: That such negligence should have been replied, or more properly speaking, newly assigned."

II.

If the loss is to be deemed a loss by explosion, instead of by a peril of the sea or danger and accident of navigation, it is covered by the exception of "explosion" in the bill of lading.

The exception is part of a paragraph of exceptions, and after enumerating a number of matters for which the vessel is not to be liable, continues: "by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances, by collision, stranding or other accidents of navigation of whatsoever kind," &c.

It was held below, and is here contended, that the meaning of the word explosion must be confined to explosions in the machinery department of the vessel, because the word *precedes* the enumeration of exceptions touching that department.

Where a general word is at the end of a clause dealing with matters of a specific kind (here if it had been at the end instead of the beginning of the machinery clause), its meaning may be limited by construing it to apply only to matters *ejusdem generis* with the preceding specific exceptions. There is no rule, we submit, by which the meaning of a general word can be narrowed and confined merely because it is *followed* by more specific words relating to a particular matter.

III.

The loss being *prima facie* within the exceptions, the burden was on the libelants to show the claimant was not entitled to the benefit of them because of some negligence on his part contributing to the loss.

This case, in its essential features, is very similar to *Transportation Co.* v. *Downer*, 11 Wall., 129. That was an action brought to recover damages for the loss of 84 bags of coffee shipped upon the propellor *Buffalo*, the property of the plaintiff in error, at the City of New York, to be transported to Chicago, which were damaged by water, owing to the *Buffalo* having stranded on entering the harbor of Chicago, and injuring her bottom, so *water entered the hold, damaging the coffee* to such an extent as to render it worthless.

The bill of lading under which the coffee was transported exempted the company from liability for loss occasioned by *dangers of navigation on the lakes and rivers.*

The defense was, that the loss of the coffee came within this exception.

Upon the trial the plaintiff showed that the defendant had the coffee for transportation and that it was damaged and spoiled while in defendant's possession. The defendant then showed by competent evidence that the loss was occasioned in the manner above stated; that is, by one of the dangers of lake navigation.

The plaintiff then endeavored to prove that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill.

The defendant moved the Court to instruct the jury as follows:

"If the jury believed, from the evidence, that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading offered in evidence, that is to say, if it was occasioned by perils of navigation of the lakes and rivers, *then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence.*"

The Court refused to give those instructions, and upon the prayer of the plaintiff, instructed the jury as follows:

"The bill of lading in this case excepts the defendant from liability, when the property is not insured from perils of navigation. It is incumbent upon the defendant to prove itself within the exception, *and it is the duty of the defendant to show that it has not been guilty of negligence.*" *Held*, error.

Mr. Justice FIELD, in delivering the opinion of the Court said:

"On the trial, the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller *Brooklyn*, in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, *dangers of lake navigation*, include all the ordinary perils which attend navigation on the lakes, and, among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. *If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the plaintiff, but the Court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the Court erred.* In *Clark* v. *Barnwell*, 13 *How.*, 272, the precise point was involved, and the decision of the Court in that case is decisive of the question in this. And that decision rests on principle.

"A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability for the loss was thus brought within the exceptions of the bill of lading. *There was no presumption, from the simple fact of a loss occurring in this way that there was any negligence on the part of the company.* A presump-

tion of negligence, from the simple occurence of an accident, seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in the performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. * * * The grounding of the propeller, and the consequent loss of the coffee, may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence or inattention. *The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other.* If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff."

In *Railroad Co.* against *Reeves*, 10 Wall., 176, Mr. Justice MILLER, in dealing with this point, said:

"Now when it is shown that the damage resulted from this (an excepted cause) immediately he is excused. *What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as released him, and then to prove affirmatively that he did not contribute to it.* If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

And in *Clark* v. *Barnwell*, 12 How., 272, the rule is stated (p. 280) to be:

"Although the loss occurs by the peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. Put in this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. * * * If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributed to perils of the sea (or other excepted causes) as to negligence, the plaintiff cannot recover."

Further cases to the same effect are:

Wertheimer v. *Penn. Ry.*, 17 Blatchf., 421.
The *Neptune*, 9 Blatchf., 193.
The *Glendarroch*, 1894 Prob., 226.
The *Hindoustan*, 67 Fed., 794 (C. C. A.).
The *New Orleans*, 26 Fed. Rep., 44.
The *Norway*, *B. & L.*, 404, 407, 408.
Phillips v. *Clark*, 2 C. B., N. S., 156.
Wild v. *Pickford*, 8 M. & W., 443, 459.
Zcech v. *General Steam Navigation Co.*, L. R., 3 C. P., 14.
Craig v. *De Largy*, 16 Scotch L. R., 750.
Dobbie v. *Williams*, 21 Scotch L. R., 667.
The *R. D. Bibber*, 8 U. S. App., 42.
The *Cleveland*, Newb., 221.

IV.

No presumption of negligence arises from the mere fact of the explosion.

Cases where negligence has been presumed from the explosion of a boiler of a vessel, which is supposed to be regularly tested and under the immediate supervision of engineers during its use (The *Sidney*, 27 F. R., 119), are not here in point. It is not a matter of common knowledge that a box of detonators or whatever it may have been that exploded was liable to explode when receiving the ordinary treatment of general cargo, or required any especial care in handling, where the proofs show it is usual to stow in the manner adopted.

The ordinary presumption would be otherwise; that the package was properly packed for shipment and prepared to receive ordinary treatment (*English* v. *Ocean Co.*, 2 Blatchf., 425).

In *Consulich* v. *Standard Oil Co.*, 122 N. Y., 118, it was held that an explosion from an oil lighter, which did

not occur from any want of attention to the lighter, but from burning oil which escaped from the defendant's neighboring oil tank into the lighter, without any proved fault on the part of the defendant, did not give rise to a presumption of negligence.

In *Walker* vs. *R. R. Co.*, 71 Iowa, 658, it was held that an explosion of a quantity of dynamite in a car standing in defendant's yard did not give rise to an inference of negligence, but that the burden of proof was upon the plaintiff to show that the place where the car was stored was an improper place or that there was some improper management of the explosive.

In the *Nitro-Glycerine Case*, 15 Wall., 534, it was held that no presumption of negligence arose from the mere fact of the explosion of a case of nitro-glycerine, which a carrier had in hand for transportation, where the package was not marked "explosive" or "dangerous," and the employees of the company were, in fact, ignorant of its explosive character. That was an action for negligence, for damage to a building occupied by the carrier, in which the explosion of the package occurred; but it is in point in the present case. The plaintiff in that case had to establish negligence in order to recover. In view of the exceptions in the bill of lading, the libelant in this case must prove negligence in order to recover. If there was no inference of negligence from the mere fact of an explosion in one case obviously there would not be in the other; and the burden of proof would remain, as in an ordinary case, unaffected by any presumption of neglect.

V.

Libelants failed to establish any negligence disentitling the steamship to the benefit of the exceptions.

1. Ignorance of the ship's officers and servants that detonators are to be classed as explosives (if they are to be so classed), was not negligence. The word "detona-

tors," or "sprengkapseln," a sa description of blasting caps, is not used in this country (Chapman, fols. 341, 343); and although it is so used in Germany they are not there held or considered commercially to be explosives (Statement of Facts, *ante*, par. 6).

In *The Nitro-Glycerine Case*, 15 Wall, 524, it was held not to be negligence, that the carrier's servants were ignorant that a package contained nitro-glycerine, or that nitro-glycerine was dangerous. It was there further held that there is no presumption of law that a carrier knows the contents of packages carried, and that being innocent of the contents of packages he may handle them as general merchandise would ordinarily be handled. Negligence in such cases must be determined by the facts and attendant circumstances. The Court cited from *Brass* v. *Maitland*, 6 E. & B., 485, the statement that "it would be strange to suppose that the master or mate, having no reason to suspect the goods offered to him for a general shipment may not be safely stowed away in the hold, must ask every shipper the contents of every package."

2. It was not negligence to stow them below deck as general cargo even if they had been recognized as German exploders or blasting caps.

As packed for shipment in Germany they are intended to be dealt with as ordinary cargo, and the usual stowage was to put them below as these were (Statement of Facts, *ante*, pars. 6 and 7).

It cannot be said to be negligence to have stowed the cargo in that way, unless the preponderance of proof shows that that was not the usual way at the port of loading.

The *Centurion*, 68 Fed., 382 (C. A.)
Baxter v. *Leland*, 1 Blatchf., 526.
Lamb v. *Parkman*, 1 Sprague, 343.

In the *Dan*, 40 Fed. Rep., 682, 692, BROWN, *J.*, said:

"There is no doubt of the general good construction and fitness of the *Dan;* and in stowing, she cannot be charged with negligence if she employs all the known and

usual precautions to insure safe transportation, having reference to the nature of the cargo (The *Titania*, 19 Fed. Rep., 107, 108; *Clark* v. *Barnwell*, 12 How., 283; *Baxter* v. *Leland*, 1 Blatch., 526; *Lamb* v. *Parkman*, 1 Sprague, 394). This rule, as respects a vessel chartered in a foreign country, and owned there, must be applied with reference to the usages of loading in that country, and the practice there prevailing."

Carver, "*Carriage By Sea*," *Sec.* 96, treats of this matter as follows:

"But where these risks have been excepted, the ship owner does not undertake that more than reasonable care and skill will be shown. Ignorance of the injurious consequences of stowing particular kinds of goods together, does not always amount to negligence, so as to prevent him from relying on the exceptions. It cannot be said that there has been negligence, or want of reasonable skill, unless the consequences of such a stowage were well known to stevedores."

In *Ohrloff* v. *Briscall*, L. R., 1 P. C., 231, Lloyd & Co. had chartered the *Helene* for a voyage from Leghorn, and they there shipped a cargo of rags, wool and forty-seven cases of olive oil. A bill of lading was given for the oil, which excepted "leakage," and this bill of lading was indorsed to the plaintiffs as purchasers of the oil. The oil was stowed in the same hold with some rags and wool, and these having become heated, the staves of the casks dried, the casks became leaky, and thus a part of the oil escaped. Dr. Lushington held the shipowners responsible for this loss, as caused by negligent stowage, but this decision was reversed by the Privy Council.

TURNER, *L. J.*, in delivering judgment (p. 238), said:

"Notwithstanding the evidence of the notoriety at Liverpool of the deleterious consequences of the collocation of oil casks with rags and wool, or other matters tending to generate heat, we do not believe that either the shippers or the shipowners in this case were aware of them. Nor do we think the ignorance of the shipowners in itself amounted to negligence. It can hardly be imputed as misconduct that the shipowners should be ignor-

ant of latent mischief of this nature, when Lloyd & Co., who are proved to have had very great experience as oil merchants, were in the same state of ignorance."

In *Carao* v. *Guimaraes*, 10 Fed. Rep., 783, where an offset for damage to cargo from improper stowage was alleged in an action for freight, BUTLER, District Judge, said:

"The obligation of the libelant, as respects delivery in good condition, was an obligation for proper stowage, *and did not extend beyond a requirement to comply with the usual custom of stowing such a cargo.*"

Appellant does not distinguish these cases by pointing out (Brief, p. 16) that some of them arose under charter-parties. In view of the exceptions here, the issue becomes, as in cases under charters, simply a question of negligence, as to which the burden is on him whose interest it is to have the negligence appear.

3. There was no neglect in failing to inform the stevedores that detonators were in the hold. In point of fact the stevedores were so informed (Statement of Facts, *ante* par. 8). Precautions were not taken because by common knowledge detonators were not deemed to be dangerous.

4. This cargo was stowed in the usual way; and if the explosion was from detonators, which seems improbable, it was, as the District Judge points out, in the nature of an inevitable accident. It was on libelant's evidence "a mystery" (fol. 302), if the explosion was from detonators.

An occurrence so rare, so unexpected in the circumstances, so unlikely to happen in the way this happened, that a great expert in denotators, called by the libelant, calls it "a mystery," belongs to the category of pure accidents, affording no just claim for compensatory damages, however calamitous or unfortunate it may be.

VI.

If it can be said there was any negligence in the stowage, it occurred in Germany; and by German law, where the contract was made, the negligence clause covering the negligence of the ship's crew, "or other servants of the shipowner," would include the stevedores, and afford exemption.

Record, folios 620–624, 664–655, 651, 664.

It is immaterial that in such case the German Courts would apply the law of the destination in determining the validity of a negligence clause (fol. 674).

It is a part of our law that the *lex loci contractus* shall be applied in determining that matter.

Fonseca v. *Cunard*, 153 Mass., 553.
Park v. *Kelley*, 6 U. S. App., 26.
Brown v. *Am. Finance Co.*, 31 Fed., 516.
The *Majestic*, 60 Fed., 624.
The *Carib Prince*, 68 Fed., 254.

And if the negligence complained of occurs in a foreign country, where negligence clauses are permitted, there is no public policy in this country which prevents the application of the foreign law.

The *Trinacria*, 42 Fed., 863.
Baljer v. *Compagnie*, &c., 59 Fed., 789.

VII.

The decree appealed from should be affirmed, with costs.

January 25, 1896.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant-Appellee.

J. PARKER KIRLIN,
Advocate.